

SERVED: October 14, 2004

NTSB Order No. EA-5116

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of October, 2004

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17176
v.)	
)	
MICHAEL ANTHONY TARASCIO,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

The Administrator has appealed from a decision Administrative Law Judge William R. Mullins rendered on September 9, 2004. By that decision the law judge dismissed an emergency order issued by the Administrator on August 10, 2004, which sought to revoke respondent's airline transport and mechanic certificates for his alleged violations of sections 43.12(a), 91.13(a) and 91.7(a) of the Federal Aviation Regulations ("FAR,"

14 C.F.R. Parts 43 and 91).¹ For the reasons discussed below, we will deny the appeal.²

The Administrator's August 10, 2004 order, which served as the complaint before the law judge, alleged, among other facts and circumstances concerning the respondent, the following:

1. You are the holder of Airline Transport Certificate Number 078445091.
2. You are the holder of Airframe and Powerplant Certificate Number 078445091.
3. Air East Management, Ltd ("Air East") was the holder of Air Carrier Certificate number RM6A36OW.
4. Air East's air carrier certificate was revoked by the issuance of an FAA Emergency Order of Revocation on or about March 8, 2004.
5. The revocation of Air East's air carrier certificate was upheld by a National Transportation Safety Board (NTSB) Administrative Law Judge on or about April 8, 2004.
6. The revocation of Air East's air carrier certificate was upheld by the full NTSB on or about May 6, 2004.^[3]
7. From at least January 2002 to March 2004, you were the President of Air East.
8. From at least January 2002 to March 2004, you were the Chief Pilot of Air East.
9. From at least January 2002 to March 2004, you operated as pilot in command of numerous passenger carrying flights for Air East.
10. From in or about January 2002 to March 2004, you directed Air East pilots not to log mechanical discrepancies or irregularities.

¹An excerpt from the hearing transcript containing the law judge's decision is attached.

²Respondent has filed a reply in opposition to the appeal.

³Administrator v. Air East, NTSB Order No. 5089 (2004). Air East operated three Lear Jet aircraft.

11. From at least January 2002 to March 2004, on numerous occasions you caused, directed or permitted to be operated aircraft in operations under Part 135 when Air East did not have a maintenance system for recording and correcting aircraft maintenance discrepancies which met the requirements of Part 135.
12. [This allegation repeats para. 11 verbatim.]
13. From at least January 2002 to March 2004, on numerous occasions you directed, caused or permitted pilots to operate aircraft in operations under Part 91 or 135 when maintenance discrepancies had not been entered in the aircraft's maintenance logbook as required by the Federal Aviation Regulations and Air East's operations manual.
14. [This allegation repeats para. 13 verbatim.]
15. From at least January 2002 to March 2004, on numerous occasions you directed, caused, or permitted Air East employees to orally report aircraft maintenance discrepancies, rather than enter them in the aircraft maintenance logbook as required.
16. From at least January 2002 to March 2004, you directed, caused, or permitted Air East employees to orally report aircraft maintenance discrepancies to you, rather than enter them in the aircraft maintenance logbook as required.
17. From at least January 2002 to March 2004, on numerous occasions you caused, directed or permitted to be operated, aircraft in operations under Part 135 when Air East maintained a fraudulent, intentionally false and/or deceptive system for recording and correcting aircraft maintenance discrepancies.
18. From at least January 2002 to March 2004, on numerous occasions you caused, directed or permitted to be operated, Air East aircraft in operations under Part 135 when you maintained a fraudulent, intentionally false and/or deceptive system for recording and correcting aircraft maintenance discrepancies.
19. By reason of the above, you made or caused to be made a fraudulent or intentionally false entry in a record or report that is required to be made, kept, or used to show compliance with any requirement under Part 43 of the Federal Aviation Regulations.

20. From at least January 2002 to March 2004, on numerous occasions you caused, directed, or permitted Air East aircraft to be operated when the aircraft were in an unairworthy condition.
21. From at least January 2002 to March 2004, on numerous occasions you operated aircraft when the aircraft were in an unairworthy condition.
22. From at least January 2002 to March 2004, on numerous occasions you caused, directed, or permitted Air East aircraft to be operated in a careless manner so as to endanger the life or property of another.
23. From at least January 2002 to March 2004, on numerous occasions you operated aircraft in a careless manner so as to endanger the life or property of another.

By reason of the foregoing circumstances, you violated the following Federal Aviation Regulations:

1. Section 43.12(a), which states that no person may make or cause to be made any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part, or reproduce or alter any record or report for fraudulent purpose.
2. Section 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
3. Section 91.7(a), which states that no person may operate a civil aircraft unless it is in an airworthy condition.

The law judge found that the Administrator had not adduced any evidence in support of her charges and directed a verdict in favor of the respondent.⁴ The law judge concluded that this case

⁴The Administrator's three charges are interdependent. The logbook and other documents are assertedly false because respondent told his pilots not to log any discrepancies, when, in the Administrator's view, there must have been some; the aircraft were unairworthy because they must have had mechanical problems that were not recorded; and operating aircraft unairworthy for want of documentation is careless or reckless. The Administrator put on no showing that any of Air East's aircraft was in fact operated on a specific flight while it had a discrepancy or

was governed by the Board's decision in Administrator v. Alvarez, 5 NTSB 1906 (1987), in which we unequivocally held that a failure to make an entry would not support a charge under section 43.12(a), as that regulation only forbids intentionally false or fraudulent *entries*.⁵

On appeal, the Administrator contends that the law judge erred by not applying the doctrine of collateral estoppel so that the finding in Air East concerning respondent's efforts to keep pilots from logging mechanical discrepancies would not have to be re-litigated here. We find no error. In the first place, the Air East case against the certificate of respondent's Part 135 air carrier did not involve any falsification charges, which is the focus of this case against the respondent's personal certificates. In the second place, given the law judge's correct ruling that the allegations under section 43.12 could not be proved on the basis of entries that were not made, collateral estoppel on the matter of respondent's improper advice to his pilots would not have advanced her case.⁶ Indeed, the Administrator's difficulty in this case is not that her position

(..continued)

condition that made it unairworthy. Moreover, the Administrator cites no authority for the proposition, evident throughout her brief, that an aircraft must be deemed unairworthy whenever maintenance work has not been recorded.

⁵We are disappointed to note that the Administrator's brief neglects even to cite Alvarez, much less make any good faith effort to distinguish it from the facts of this matter.

⁶Respondent's conduct in this regard was relevant to the record-keeping allegations litigated against Air East.

ignores Alvarez, it's that she did not charge respondent with a breach of his maintenance logging obligations (see, e.g., FAR section 43.9), she charged him in effect with a failure honestly to record maintenance or allow it to be recorded by others.⁷

The Administrator's contention that the law judge should not have dismissed the non-falsification charges as stale under Rule 33⁸ also reflects a misapprehension as to the reach of FAR

⁷The Administrator argues that documents respondent and his pilots signed (such as Administrator's Exhibit 13) returning aircraft to service after maintenance should be deemed false because of the policy of not logging all maintenance. She submits that these documents established a prima facie case in support of the falsification charge. There was, however, no showing that any of the aircraft returned to service was in fact unairworthy or that respondent did not actually perform, or have performed, the maintenance he told others not to log. The Administrator's suspicion that the aircraft were not airworthy despite the return to service certifications is not evidence that would defeat a motion for a directed verdict.

⁸Rule 33 of our rules of practice provides as follows:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

section 43.12. In our view, since the allegation of false entries was unsustainable on its face, in light of Alvarez, no issue of lack of qualification was presented and the law judge was thus free to determine whether the Administrator had taken more than six months to bring the airworthiness and carelessness charges. Since she had, but had not shown good cause for the delay in bringing those charges, they were subject to dismissal on the respondent's motion. The law judge's ruling was proper.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The September 9, 2004 order of the law judge is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

(..continued)

(b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.